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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 872

CLAUDE R. KIRK, JR., as Governor of the State of Florida, et al.,

Appellants,

v.

EDMOND J. GONG, et al.,

Appellees.

Appeal from the United States District Court for the Southern District of Florida

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MOTION TO AFFIRM

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Appellees move to affirm, pursuant to Rule 16(c), the judgment sought to be reviewed in this appeal on the ground that it is manifest that the questions on which the decision of the cause depend are so unsubstantial as not to need further argument.

STATEMENT

Appellees Gong, Baker, Kruse and Griffin[1] commenced this action in March, 1964 to challenge the constitutionality of the Congressional districting law of Florida. Appellees' motion to convene a three-judge court was denied. There were then two decisions of the single-judge District Court adverse to Appellees on the merits. The appeal from the second of these decisions was dismissed on jurisdictional grounds by the United States Court of Appeals for the Fifth Circuit but with leave to Appellees to renew their request for a three-judge court. Such a District Court was duly convened, found the Florida Congressional districting law unconstitutional, and ordered the implementation of a new districting plan with a maximum deviation from smallest to largest district of only 1.94%.

Appellees submit that all parties to this cause stipulated in the District Court that the only proper basis on which to create a constitutional Congressional districting plan for the State of Florida was the 1960 decennial census; that the District Court utilized this basis with essential reliance on a plan submitted by Appellants, but significantly improved this plan; that the plan as so developed is a rational plan meeting all constitutional tests; that the factoring of counties under the plan was done in accordance with the parties' stipulation as to the *only* proper basis of factoring; and that Appellants are now precluded from challenging the accepted plan which was essentially their plan. Appellees, therefore, submit that the decision of the District Court should be affirmed without further argument.

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[1]The members of The Board of County Commissioners of Dade County, Florida, who were defendants below, are also Appellees.

The Final Order of the District Court redistricts the twelve Congressional districts in the State of Florida. This districting is done on the basis of the 1960 decennial census, which has repeatedly been held by this Court to be the appropriate basis. *Reynolds v. Sims*, 377 U.S. 533 (1964); *Maryland Citizens Committee for Fair Congressional Districting, Inc. v. Tawes*, 253 F. Supp. 731 (D. Md. 1966), aff'd *sub nom*, *Alton v. Tawes*, 384 U.S. 315 (1966); *Lucas v. Rhodes*, 36 U.S.L.W. 3225 (1967). Appellants refer in their Jurisdictional Statement to cases indicating that use of any interim census figures is improper. These cases are inapposite, since the only census used by the District Court was the 1960 decennial census.

The basic plan used by the District Court in developing its plan was originally submitted to the District Court by *Appellants* as a "fair and constitutional Congressional redistricting." The plan submitted by Appellants contained a total percentage deviation from the smallest to the largest district of 2.81%, with the smallest district being 1.25% under the mathematically perfect constituency and the largest district being 1.56% in excess of the mathematically perfect constituency. The District Court, modifying that plan by transferring peripheral precincts, reduced this maximum variation to 1.94%, ranging from 1.20% under the mathematically perfect constituency to .74% in excess thereof. *The plan adopted by the District Court contained smaller variations than those in any plan submitted by any party.*

Creation of twelve equal Congressional districts without division of counties was not possible. Thus Dade County with one-fifth of Florida's 1960 population had to be

divided; the challenged legislative plan[2] had previously divided Dade County into three parts. Since counties required division, the District Court divided them into voting precincts—the only feasible electoral unit smaller than a county. Since federal census figures were not available by voting precinct, a calculation of the population of each relevant voting precinct was made by determining the ratio of the registered voters in each such voting precinct to the total registered voters in the particular county and applying that ratio to the county population as shown by the 1960 decennial census.

All parties before the Court, including the Appellants, agreed that this method of factoring the population of individual counties selected by the Court was in fact the proper method.[3] As the District Court stated in its Opinion:

> "Since federal census figures are not available by presently established precincts, a calculation of the population of each relevant voting precinct was made by determining the ratio, based on the most recent voter registration figures, of the registered voters in each voting precinct to the total registered voters of the particular county and applying that ratio to the county population as shown by the 1960 decennial census: *i.e.*, county registration is to county population as precinct registration is to precinct population. *This formula was suggested by both plaintiffs and defendants.*" (emphasis added)

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[2]Fla. Stats., Sec. 8.01, Chap. 65-2441, Fla. Laws (1965).

[3]The Florida Legislature had also previously accepted this method of factoring population. Fla. Stats., Sec. 8.01, Chap. 65-2441, Fla. Laws (1965).

After the District Court entered its Opinion and Final Order, Appellants, at the request of Congressmen disappointed by the re-alignment of their particular districts,[4] filed a Suggestion for Reconsideration contending that additional Bureau of Census estimates existed (set out in an informal letter from the Bureau) which indicated that the plan adopted by the District Court might contain a maximum population variance of 11.83% rather than the 1.94% which the District Court had found the plan contained. The source of this conclusion by the Bureau of Census is undisclosed. The location of the material on which the conclusion is based is likewise undisclosed. The District Court determined in its Opinion:

> "In his scholarly brief Dr. Dauer [Professor of Political Science, University of Florida] urged the use of federal census enumeration districts. These are small areas each with a population of close to 1,000 inhabitants, for which census data are tabulated. Dr. Dauer claims that these enumeration districts are accurate, and that by using them as building blocks it would be possible to arrive at districts with a deviation from largest to smallest district of two per cent. Maps of each county, showing the number of inhabitants in and the geographic boundaries of each enumeration district are the working papers for figures published by the United States Bureau of Census. These working papers are not published generally

[4]Appellants, after reviewing the proposed order of the District Court, suggested the realignment of the Dade Congressional districts to the pattern desired by a particular congressman. Even in this proposal Appellants followed the method of factoring counties adopted by the District Court. It was only when more than one congressman complained that Appellants suggested a new method of factoring.

> but photostats are sold by the Bureau, and a set is available at the College of Business Administration, University of Florida. However, the data is not available in county records, and it is not feasible for the court to seek out, correlate and digest the voluminous documents and data. Furthermore, as previously noted, the plan adopted by the court contains a total maximum deviation of less than two per cent."

Appellees have never taken any exception whatsoever to these observations or conclusions of the District Court.

The use of registered voter figures for certain purposes in reapportionment plans has been approved by the Supreme Court. *Burns v. Richardson*, 384 U.S. 73 (1966). The only caveat established by the Court in *Burns* was that "the distribution of registered voters approximates distribution of state citizens or another permissible population base." 384 U.S. at 94. Even accepting as true the Bureau of Census figures suggested by Appellants, these figures do not show violation of this standard. Of course, the District Court in the instant case did not use the number of registered voters in place of actual population figures as a method of districting, as was done in the fact situation involved in *Burns*. Instead, the District Court merely used the registered voter statistics as a method of deriving precinct population figures. This method of factoring was not only *a* rational basis but was in fact the basis suggested to the District Court by both Appellants and Appellees as the *only* rational basis.

CONCLUSION

Appellees commenced this action in 1964. Two District Court decisions, one United States Court of Appeals decision, and numerous legislative efforts later; a third District Court decision has given the citizens of Florida substantial equality of Congressional districts. Appellees submit that the District Court's improvement on Appellants' own plan should be affirmed.

Respectfully submitted,

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